4254

In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of GEORGE E. TILTON, Bankrupt.

GEORGE E. TILTON, Appellant

vs.

ANNA J. HELMS, ELIABETH KEELAN, MAGDA OLSON, REBECCA S. KNIGHT, R. BLIX, FRANCES BLIX, CHRISTINA WADMAN, J. J. MIDDAL, J. STARUP, ANNA C. ADAMS, JESSIE HUMPHREY, ALICE SAXON and RUTH SAXON, Appellees

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Brief of Appellees

ALBERT J. ALLEN
SOLON T. WILLIAMS
Attorneys for Appellees
505 Leary Building, Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of GEORGE E. TILTON, Bankrupt.

GEORGE E. TILTON, Appellant

vs.

ANNA J. HELMS, ELIABETH KEELAN, MAGDA OLSON, REBECCA S. KNIGHT, R. BLIX, FRANCES BLIX, CHRISTINA WADMAN, J. J. MIDDAL, J. STARUP, ANNA C. ADAMS, JESSIE HUMPHREY, ALICE SAXON and RUTH SAXON, Appellees

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

---

Brief of Appellees

STATEMENT OF THE CASE

Appellant in his statement of the case has included nothing which appellees care to controvert; he has, however, omitted one fact which has at least

as much bearing on the case as his statement that he delivered to his assignees property of an estimated value of approximately one hundred forty thousand dollars. This fact is that his estate was appraised at approximately fifty-nine thousand dollars.

ARGUMENT

The only question upon this appeal is whether section 14, sub "b" of the bankruptcy act, under the facts in this case, as passed upon by the trial judge justify the refusal of the bankrupt's general discharge.

The trial judge held that the receipt given to Mr. Blix was insufficient to prevent this discharge, that receipt and the evidence regarding it may therefore be disregarded.

He did hold, however, that under the testimony receipts of which the following is a copy, changing only dates, amounts and names, brought the case within the statute:

"20 October, 1920.

"Received from Anna J. Helms, Five Hundred and no/100 Dollars for loan purposes to be loaned and returned 6 months from date, plus interest at rate of 10% per annum.

"$500.00

"G. E. TILTON."

A better consideration of the case may be had by reciting at this point the exact words of the trial judge in his oral opinion and the remarks of appellant's counsel:

". . . . . As to these two parties who testified, Mrs. Helms and Miss Keelan, the discharge will be denied. As to whether the discharge (this is evidently a misprint for "order") should be general, I am not conclusive; I have not thought about it any further. If you desire to submit anything on that I would—

"MR. EMORY (Counsel for objecting creditors): I will be glad to submit authorities.

"MR. RUMMEN (Counsel for appellant): I am afraid one five-cent bill would deny a million dollar discharge."

Transcript of Record, pp. 16-17.

We quote farther from the record the formal findings and decisions of the trial judge:

"At the conclusion of the hearing the court announced its findings upon the facts, and held that the objections to the discharge on the part of two of the creditors, Anna J. Helms and Elizabeth Keelan, were sustained. The matter was continued to determine whether the denial of discharge extended to all of bankrupt's debts. Authorities have been submitted by the objecting creditors and a voluminous brief presented and authorities cited, by the bankrupt, upon inefficiency of the proof to sustain the charge.

"Without reviewing the issue of fact *in extenso*, reflection upon the testimony and record submitted does not change the conclusion announced at the closing of the trial. I am satisfied from all of the testimony that the receipt of memoranda executed did not truthfully state the conditions upon which the money was paid to the bankrupt. [16.] The bankrupt in his testimony, as I understand it in substance, stated that in some conversation with some of the creditors he did say that the receipt did not clearly state the conditions of the loan. A rational human being is presumed to intend the natural and probable consequences of his words and

conduct. The money was obtained by the bankrupt upon the receipt as the inducing cause, which did not state the fact. So concluding upon the facts, the objections to discharge will be sustained.

"In re Miller, 192 Fed. 730.

"NETERER,
"U. S. District Judge."

Appellant relies here, as he did below, upon certain *obiter dicta* contained in the decisions he has cited, which read into the law the word "FINANCIAL" and give to that word a technical definition.

In no one of these cases was the direct question before the court, whether this word should be so read into the statute with the meaning which has been given to it by commercial agencies.

The language of the statute is plain and hardly needs judicial construction:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto, by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits

of the application and discharge the applicant unless he has . . . . . (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; . . . . ."

There is nothing in this language to justify a construction such as is given in the opinion quoted by appellant from *In re Morgan*, 267 Fed. Rep. 959:

"It is plain that the intent of congress was not to extend the statute to all cases of false written statements where credit happens to be given, and the thought being to confine the statute to cases where the decision to give credit was induced by the false statement. Such statement must be a financial statement as distinguished from a mere misrepresentation."

This dictum was repeated in the *Lundberg* case, cited by appellant; but the facts in the *Lundberg* case are in no sense parallel with the facts here, and they did not require for the decision of the case the principle announced by the dictum.

In the *Robinson* case cited by appellant the court of appeals in commenting upon the record drew attention to the fact that the referee and the district court disagreed upon this very proposition now under consideration. The referee held as is contended by appellant here, that the statement must be a FINANCIAL statement, the district judge

holding that it need not be provided it was a false statement in writing given for the purpose of obtaining credit of money or goods and upon which credit was actually obtained. The circuit court says:

"We agree with the learned district judge that a 'materially false statement in writing' cannot the bankrupt, or a STATEMENT OF HIS FINANCIAL CONDITION, and that it may include any be confined to a FINANCIAL statement made by 'materially false statement in writing' made by the bankrupt for the purpose of obtaining money or property on credit and by which such money or property is obtained."

The case was decided by the circuit court of appeals upon an entirely different question.

In re Robinson, 266 Fed. Rep. 970.

The *Hudson* case, cited by appellant, concedes that the facts given in that case bring it technically and literally within the law.

The court, a district court, then proceeds to quote this dictum of the necessity of its being a FINANCIAL statement, but seems to rely principally upon the inconsistency of section 14-b and section 17-2 of the bankruptcy act, a point which we shall hereafter notice.

Rea Bros. case cited by appellant was the case of a check given where there were no funds. This class of cases will also be referred to in discussing another phase of this appeal.

In the *Tanner* case, cited by appellant, there was just the kind of FINANCIAL statement which appellant seems to delight in referring to, it was a statement of the bankrupt's FINANCIAL CONDITION, it was found to be false. Judge Rudkin in his opinion quoted this dictum, why we cannot see, but he based his decision upon the ground that procuring a bonding company to indemnify the bankrupt by means of this statement was not obtaining money or property.

The testimony of Anna J. Helms shows:

That on March 10, 1919, she gave the bankrupt $1,000; that he had been represented to her as a loan agent and that he told her he loaned money and always loaned it out on good security, taking only one-third of the value, with interest at 10 per cent; that he said he was always careful to look over his loans; that the bankrupt gave her a re-receipt for $1,000; that altogether in 1919 she loaned the bankrupt $6,000; that during that time she drew out $2,000, leaving $4,300 that was not returned.

"Q. You really loaned him altogether a total of $6,300?

"A. Yes, sir."

That the bankrupt exchanged the $1,000 receipts into $500 receipts. He said he could handle them better in $500. Originally the receipts were for six months. He said any time I wanted my money to let him know two weeks ahead and I could have it. He kept his interest payments up regularly until the bankruptcy, when he told me he was broke.

That as to the $300 loan in September, 1919, the bankrupt took witness in an automobile to show some securities [7] that he had up for a loan; that they looked at a piano, certain fixtures in the Mayflower Hotel and a houseboat on Lake Union; that the houseboat was agreeable to her and on returning to the bankrupt's office she gave him a check for $300.00 to loan on the houseboat; that the bankrupt took no security for the $300.00 as far as she knew and gave her nothing but a receipt; that the bankrupt after he was broke, stated he had used the money personally, placed it in a general fund and used it for his personal use; *that he then desired to change the receipts into promissory notes;* that two of the receipts have been changed into promissory notes; that he paid $110 upon the notes.

That she would not have loaned the money if she had known the bankrupt was going to put it to his own use. (Rec. pp. 8-9.)

The testimony of Elizabeth Keelan shows:

"Q. Did you during November, 1920, loan Tilton $500 in cash.

"A. Yes, sir.

"Q. Was that $500 loan made in one loan or in several loans?

"A. Two."

That the bankrupt said he was a loan agent and never let out money except on good security and at one-third of the value; that shortly after the loan the bankrupt desired to change the receipts into notes; that she would not have loaned the money if she had known he was going to apply it to his own use. (Rec. p. 10.)

Upon these receipts and upon this testimony and the testimony of the bankrupt Judge Neterer found:

"The receipts as given to Mrs. Helms which say 'Received from Anna J. Helms $500 for loan purposes, to be loaned and returned six months from date, plus interest at the rate of ten per cent per annum,' create a relation between Mrs. Helms and Mr. Tilton other than that of principal and creditor.

"The money was given for a specific purpose. It was for loan purposes. Now that was for loans for Mrs. Helms, and by that receipt Mr. Tilton impliedly agreed that that fund would be loaned for Mrs. Helms. He has not placed it into a general fund useful for a general purpose; and when he failed to do that he violated a trust that was impliedly created at least by these receipts.

"I am satisfied by the testimony of all parties that that was at least the understanding of Mrs. Helms, and the conduct of the defendant, the very substance of the receipts, would lead her to that conclusion. (13.)

"And the same applies to—what was the name of the other woman who testified?

"MR. EMORY: Miss Keelan.

"THE COURT: Miss or Mrs.?

"MR. EMORY: Miss Keelan.

"MR. RUMMENS: Didn't Miss Keelan testify that she went there and loaned it to Mr. Tilton?

"THE COURT: I am referring to the receipts. The receipt is the same general relation and in substance I guess exactly the same.

"So, as far as these parties are concerned, I think that they have a right to successfully resist this discharge." (Rec. pp. 15-16.)

It was from these considerations that Judge Neterer denied the discharge, and should he not have done so?

The object of the bankruptcy act is not to permit everyone who has either voluntarily or involuntarily been made a bankrupt, again to resume his activities, but only the HONEST bankrupt.

The argument submitted by appellant would apply to a motion for the discharge of Ponzi as logically as it applies here. Ponzi's statements upon which he obtained money and property in a vast amount, were not FINANCIAL statements such as appellant contends should be the only kind to prevent a discharge.

It is true that the courts hold universally that this act should be liberally construed in favor of the bankrupt; but that does not mean that any of its provisions should be nullified by construction.

When a bankrupt's misfortunes or mistakes, not wilful, have brought about his condition and he shows a desire again to enter into business, every assistance should be given him by the courts as well as by everyone else.

And the burden of showing that his actions were wilfully and knowingly such that he should not be again permitted to exercise his peculiar methods is upon those opposing his discharge. All this is freely granted.

Our contention is that when we have shown that the bankrupt obtained money from Mrs. Helm and Miss Keelan upon the credit of materially false written statements made to them by the bankrupt, which he knew to be false and which he made for the purpose of obtaining this money from them, then we have made out a case which calls for the denial of the petition for discharge of the bankrupt.

In the opinion of the trial judge we have met this burden.

"We agree with the learned district judge that a 'materially false statement in writing' cannot be confined to a FINANCIAL statement made by the bankrupt, or a STATEMENT OF HIS FINANCIAL CONDITION, and that it may include any 'materially false statement in writing' made by the bankrupt for the purpose of obtaining money or property on credit and by which such money or property is obtained."

In re Robinson, 266 Fed. Rep. 971.

This is exactly what Judge Neterer held, and he gave his reasons for so holding in his opinion above quoted.

"I am satisfied from all of the testimony that the receipt of memoranda executed did not truthfully state the conditions upon which the money was paid to the bankrupt. The bankrupt in his testimony, as I understand it in substance, stated that in some conversation with some of the creditors he did say that the receipt did not clearly state the conditions of the loan. A rational human being is presumed to intend the natural and probable consequence of his words and conduct. The money was obtained by the bankrupt upon the receipt as THE INDUCING CAUSE, which did not state the fact."

Record, p. 19.

Appellant has raised the question of the inconsistency of section 14-b and section 17-2 of the bankrupt act, should section 14-b be construed as the trial judge construed it, and as appellees contend for.

While in the *Hudson* case, 262 Fed. Rep. 778, this question seems to have been seriously considered, the distinction seems too plain for argument.

Section 14-b of the bankruptcy act denies the right of discharge to any bankrupt who has "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

Section 17-2 of the act provides that the bankrupt upon discharge shall not be released from such debts as "are liabilities for obtaining property by false pretenses or false representations."

There is no inconsistency in these two sections.

One relates to the obtaining of money or property on the faith of a "materially false statement in WRITING"; the other relates to "obtaining property by false pretenses or false representations."

Very plainly oral testimony might bring about the result that a discharge did not affect a debt caused by false pretences or false pretences when suit was brought against the bankrupt after his discharge.

And with that question the bankrupt court would have nothing to do, nor could the question be raised at any time or place except upon suit in which the bankrupt had pleaded his discharge as a bar.

Just as plainly oral testimony alone would not avail under section 14-b to prevent the discharge of the bankrupt.

Such discharge under that subdivision can be prevented only by the "materially false statement in WRITING" as the basis and such oral testimony as may under the circumstances be material.

It is true that even if this discharge is granted it would be unavailing against a suit brought by these claimants in some other court.

But that is not a thing to be considered on behalf of the appellant.

Because he is subject to a less penalty is no ground for his claiming that he is not also subject to a greater.

Simply for the purpose of analogy we would suggest that by the same logic one guilty of grand larceny might say: "But I am guilty of petty larceny; the state can punish me for that and should not therefore punish me for this greater offense."

Under specification No. 7 the question is put to Your Honors whether this order denying the discharge should be general or confined only to the Helms and Keelan claims.

Appellant conceded in the court below our contention that the order of denial if granted at all, should be general.

"MR. RUMMENS: I am afraid one five-cent bill would deny a million dollar discharge." Record, p. 17.

Mr. Rummens spoke advisedly.

"The making by a bankrupt of a materially false statement in writing to any person for the purpose of obtaining property on credit and upon which statement property is so obtained prevents the granting of a discharge; and the objections may be interposed by any party in interest."

In re Miller, 192 Fed. Rep. 730.

This decision cites the following cases:

Gilpin vs. National Bank, 165 Fed. Rep. 607;

Talcott vs. Friend, 179 Fed. Rep. 676;

In re Harr, 143 Fed. Rep. 421;

In re Brener, 166 Fed. Rep. 930;

In re Augspurger, 181 Fed. Rep. 174.

Appellant has consumed much space in the citation of authorities upon the proposition that AN HONEST BANKRUPT should be given another chance.

With that proposition we have no quarrel; but we do believe, and that is the basis of our contention here, that a Ponzi should not be permitted to repeat. This was evidently the consideration which controlled Judge Neterer's decision, and upon that we base our prayer that this decision be affirmed.

ALBERT J. ALLEN,
SOLON T. WILLIAMS,
Attorneys for Appellees.